

February 5, 2018

BY ELECTRONIC FILING

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: NOTICE OF EX PARTE

WT Docket No. 17-79: *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment;*

WT Docket No. 15-180: *Revising the Historic Preservation Review Process for Wireless Facility Deployment;*

WC Docket No. 17-84: *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*

Dear Ms. Dortch:

On February 1, 2018, Courtney Neville and I of Competitive Carriers Association (“CCA”)¹ met with representatives of the Federal Communications Commission’s (“FCC” or “Commission”) office of Commissioner Clyburn, office of Commissioner Carr, and office of Commissioner Rosenworcel. A full list of meeting participants is below. CCA applauds the FCC’s work thus far to substantively address barriers to broadband deployment, and encourages the Commission to heed CCA’s recommendations on ways to advance this mutual goal. Specifically, CCA underscores the need for the Commission to find that small cells and Distributed Antenna System (“DAS”) deployments are outside the scope of a “federal undertaking” under the National Historic Preservation Act (“NHPA”). This conclusion is in line with the underlying statutes and would support the Commission’s policy goals.

CCA’s members continue to have a keen interest in reducing escalating fees and administrative delays presented by the Section 106 review process, per the NHPA. Specifically, Tribal fees and administrative burdens attached to the historic review process have escalated sharply in recent years,² and these costs and permitting delays will continue to rise as CCA members deploy to meet consumers’ increasing data demands. CCA referenced its white paper “Clearing the Path for America’s Wireless Future: Addressing Hurdles to Meet the Pressing Need for our Nation’s Wireless Infrastructure,” as a good resource to highlight the need for historic review reform.³ For example, CCA members have faced Tribal fees ranging from \$250 to \$1,650 per Tribe per location, usually with little explanation as to the discrepancy in price. That is an average of more

¹ CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

² See Comments of Competitive Carriers Association, WT Docket No. 17-79, WC Docket No. 17-84, at 18, 25-35 (filed June 15, 2017) (“CCA Comments”); *Clearing the Path for America’s Wireless Future*, Competitive Carriers Association (filed June 8, 2017) (“CCA White Paper”).

³ See *id.*

than \$6,300 per project based on costs reported by CCA members in late 2016 to early 2017.⁴ Application review processes also are increasingly repetitive; in 2012, the average site received payment and information requests from just under two Tribes, while in 2016, the number of Tribes reviewing each site was more than ten.⁵

CCA therefore encourages the FCC to continue conversations with Tribal Nations to articulate a process that explicitly states that paying Tribal fees, either for review or for subsequent consultation activities, is not required under the NHPA or the National Programmatic Agreement (“NPA”).⁶ CCA reiterated that FCC practices requiring siting applicants to pay Tribal fees and secure Tribal consultations have no basis in the NHPA nor the NPA, and were never adopted as an actual rule through notice and comment. To further collaboration, CCA also reiterated its suggestion to create a third-party database of interests and fees reported by Tribes.⁷ Streamlining the process for Tribal fees, and collecting uniform information of all culturally significant areas will expedite the siting process and assuage confusion surrounding siting applications.

Additionally, as noted above, CCA urges the Commission to find that small cells and DAS deployments are outside the scope of a “federal undertaking” under the NHPA.⁸ Specifically, the Commission’s *Accelerating Wireless Broadband Deployment* Notice of Proposed Rulemaking acknowledges that the FCC long ago relieved siting applicants from the need to petition the Commission for a siting construction permit⁹ and spectrum licensees or other siting applicants “now authorize transmissions over a particular band of spectrum within a wide geographic area without further limitation as to transmitter locations.”¹⁰ Further, small cells and DAS are materially different than their tower and macrocell predecessors, regarding both size and visual or actual impact. Accordingly, the Commission should determine that small cells and DAS do not have the potential to cause effects to Historic Properties, and exclude small cell and DAS deployments from Section 106 review.¹¹

⁴ See *id.* at 2.

⁵ See *id.* at 12-13.

⁶ See CCA Comments at 24-25 (explaining that “[n]either the NHPA’s or ACHP implementing rules require payment of Tribal fees, or indicate paying Tribal fees is required to comply with the NHPA; both regulations are silent on that account. As the Commission points out, the ACHP issued guidance regarding fees, first in a memorandum in 2001; this advice was reiterated in ACHP handbooks ever since, most recently in 2012. The ACHP 2001 Fee Guidance explains that “[w]hen the Federal agency or applicant is seeking the views of an Indian tribe to fulfill the agency’s legal obligation to consult with a tribe under a specific provision of ACHP’s regulations, the agency or applicant is not required to pay the tribe for providing its views,” and that “[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.” Most importantly, the guidance provides that “[No] portion of the NHPA or the ACHP’s regulations require[s] an agency or an applicant to pay for any form of tribal involvement.”).

⁷ See CCA Comments at 33.

⁸ See *id.* at 47. A federal “undertaking” under NHPA includes projects, activities, or programs that “requir[e] a Federal permit, license, or approval[.]” See also, 54 U.S.C. § 300320(3); see also 40 CFR § 1508.18(b).

⁹ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC 17-38 (WTB 2017) ¶ 26 (“Wireless NPRM”).

¹⁰ *Id.*

¹¹ See 36 CFR § 800.3(a)(1). Based on its authority under Section 800.3(a)(1), the Commission has established targeted unilateral exclusions from historic preservation review requirements for certain small facility collocations on utility structures and on buildings and other non-tower structures, provided they meet certain specified criteria. *2014 Infrastructure Order*, 29 FCC Rcd at 12901-12, ¶¶ 76-103.

The Commission also should adopt a definition of “small cell” that avoids unintended consequences while adequately addressing carriers’ deployment needs.

CCA also explained that clarifying application processes and establishing reasonable shot clocks on siting applications will mitigate right-of-way (“ROW”) negotiation and approval process delays. Specifically, the FCC should clarify that any ROW-related fees should be based on authorities’ actual costs, and address inequitable ROW management charges.¹² The Commission also should adopt a broader ROW historic review exclusion paralleling the current framework for communications and utility ROWs, that covers construction or collocation of communications infrastructure in any public or utility rights of way.¹³ Together, these efforts will clarify the application review and deployment process in ROWs for all stakeholders, and foster further industry collaboration with Tribal Nations. For example, CCA has noted examples of members’ collaboration with Tribal Nations, including Union Wireless, who has worked with the Eastern Shoshone and Northern Arapaho Nations of the Wind River Reservation in central Wyoming for years, developing sites on Tribal trust lands to provide critical wireless services to Tribal members in extremely remote locations.¹⁴ Clarifying and streamlining application review and the deployment process in ROWs will aid CCA members in promoting meaningful business opportunities with Tribes and increasing access to broadband on Tribal lands, which are perhaps the most historically unserved areas.

Further, the FCC should provide an opportunity for carriers to submit “batch” applications for a network under applicable shot clocks. This is appropriate and helpful since next-generation networks are increasingly comprised of dozens of small cells, potentially supported by dozens or hundreds of poles. CCA suggested that the Commission adopt a rule allowing a certain amount of applications per geographic area, such as a square mile.

Finally, the FCC must ensure deployment avoids harming historic property within a fair, equitable, and predictable legal framework. CCA understands that certain Tribes also often feel the strain of reduced network deployment especially since Tribal lands are among the most underserved areas of the country. CCA encourages the Commission to explore policy opportunities outside of its infrastructure proceedings to ameliorate barriers to deployment.¹⁵

¹² See CCA Comments at 18.

¹³ See *id.* at 18, 20. See also, Notice of Issuance of Program Comment for Communications Projects on Federal Lands and Property,” 82 FR 23818, May 24, 2017.

¹⁴ See letter from Rebecca Murphy Thompson, EVP & GC, Competitive Carriers Association, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 (filed Jan. 17, 2018) (“CCA ONAP Ex Parte”).

¹⁵ Promoting Telehealth in Rural America, *Notice of Proposed Rulemaking*, WC Docket No. 17-310 (rel. Dec. 18, 2017).

CCA looks forward to continued work with Tribal Nations and all industry stakeholders to streamline and update infrastructure siting policies to reflect changes in technology. This *ex parte* notification is being filed electronically with your office pursuant to Section 1.1206 of the Commission's rules. Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
EVP & General Counsel
Competitive Carriers Association

cc (via email): **Office of Commissioner Clyburn**
Claude Aiken
Louis Peraertz

Office of Commissioner Carr
Will Adams

Office of Commissioner Rosenworcel
Travis Litman
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Attachments